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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>AARON KRISTOPHER TINGLE,<br>Defendant and Appellant. | A153461<br><br>(Alameda County<br>Super. Ct. No. 16-CR-018118) |

Appellant Aaron Tingle was convicted following a jury trial of assault with a deadly weapon. On appeal, he contends (1) the trial court abused its discretion when it admitted hearsay declarations from a 911 call; (2) the court abused its discretion and violated his right to a fair trial when it changed its pretrial ruling during his direct testimony and admitted evidence of two prior misdemeanor convictions to impeach his testimony; (3) these errors were cumulatively prejudicial; and (4) the court improperly imposed a one-year consecutive sentence for a prior prison term because the prosecutor failed to prove that appellant did not remain prison- or felony-free for a continuous five-year period. We shall affirm the judgment.

## PROCEDURAL BACKGROUND

Appellant was charged by information with assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] The information alleged that appellant personally inflicted great bodily injury on the victim, Ada L. (§ 12022.7, subd. (a)), causing the offense to be a serious felony (§ 1192.7, subd. (c)(8)). The information further alleged three prior

[1] All further statutory references are to the Penal Code unless otherwise indicated.

felony convictions, including two prior strike convictions (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). Finally, the information included a prior prison term allegation (§ 667.5, subd. (b)).

The jury found appellant guilty of assault with a deadly weapon, but found not true the great bodily injury enhancement allegation. The court found true the prior conviction and prior prison term allegations.

On January 12, 2018, the court sentenced appellant to a total of 14 years in prison.

On January 19, 2018, appellant filed a notice of appeal.

## FACTUAL BACKGROUND

### *Prosecution Case*

Ada L. testified that she is the sister of appellant's girlfriend, L.L. In December 2016, Ada had been living with L.L. for about three months in L.L.'s apartment in transitional housing in Berkeley. Ada's other siblings, her grandmother, and several children were also living there.

On December 21, 2016, Ada was packing up her belongings because L.L.'s lease was up and they had to move out of the apartment. L.L. arrived with appellant and introduced him to Ada. Later, when Ada was outside the apartment talking with some other tenants of the building, appellant and L.L. walked by and appellant said to Ada's mother, " 'Once again, you guys need to watch your mouth and the foul language coming out of you guys' mouth.' " Ada, who "didn't appreciate what he was saying, because he said it in an aggressive way, responded, " 'Since we need to watch our mouths, then you need to pull up your pants,' " talking about his "sagging" pants. Appellant then left.

Ada spent that night at a hotel, but returned to the apartment the next morning, December 22, 2016, around 7:00 or 7:30 a.m., to collect the rest of her belongings. Because she had already returned her key and she thought L.L. might be asleep, Ada knocked hard on the front door. She had been knocking for 10 or 15 minutes when appellant opened the door. Ada said "thank you" and went inside, where she saw L.L. asleep on an air mattress in the living room. Ada had been talking to her father on her

cell phone when appellant opened the door and continued the phone call after she went inside and began gathering her belongings.

Appellant went to the bathroom and then lay down on the air mattress in the living room while Ada got her things out of the hall closet. She was still talking on the phone to her father when appellant twice said something like, " 'Watch your language around me.' " He spoke very aggressively. When Ada responded aggressively that she did not have to watch her language, appellant stood up on the mattress. After arguing back and forth, Ada walked toward the mattress and asked L.L. to calm appellant down so she could gather her things and leave the apartment. L.L. stood up and was standing between Ada and appellant. L.L. asked Ada to leave, but Ada said she was not leaving until she got her stuff.

As Ada talked to her sister, appellant punched her on the left side of her face. She testified that then, "[w]e just went to fighting" and "I went to go defend myself, but then he just kept just jabbing. . . . He is just steadily beating me, just literally punching me." She tried to hit him back, but did not think she made contact because he was much bigger than her. At one point, when she tried to get away, appellant grabbed her by the hair and "bashed his fist" into her "face real bad." Ada tried to run out of the apartment, but appellant came after her and kept grabbing her clothes and hair and punching her.

Ada got outside of the apartment, but appellant followed her and continued to grab and punch her, knocking her down more than once. She eventually was able to get down the front stairs, and around to the back door of the building, but appellant was chasing her, so she went up the back stairs and ended up back at L.L.'s apartment. She hoped to be able to get inside the apartment and lock the door, but appellant caught her and continued to beat her. A neighbor came out of his apartment and tried to stop appellant, saying, " 'No, stop.' " But appellant grabbed a fire extinguisher that was in L.L.'s apartment and swung it at Ada; she used her hands to try to stop him, but the fire extinguisher hit her in the head. Ada, whose vision was somewhat blurry at that point, ran out of the apartment, but fell down the front stairs, landing on her back. Appellant followed her down the stairs and hit her in the left temple area with the bottom circular

part of the fire extinguisher.[2] His face looked violent, vicious, and cocky as he hit her. One of the tenants then helped her up the stairs.

By the time the police arrived, appellant had punched Ada at least 13 or 14 times and hit her twice with the fire extinguisher. After talking to the police, she was taken by ambulance to a hospital, where she was treated for her injuries. She had a black eye and got 11 stitches for a cut on her head, which was caused by the hit from the fire extinguisher. At the time of the incident, Ada was five feet six inches tall and weighed 145 pounds. During the incident, she did not have a knife or any other weapon in her possession and she never attacked appellant.[3]

Around 7:30 a.m. on December 22, 2016, Zyna N. was walking through a parking lot behind the Berkeley Police Department when she heard voices nearby that were "arguing, cursing, shouting," and then a female voice "yelling 'stop' several times and then . . . more cursing and arguing." She "was hearing thumps and thuds," and heard someone again say, " 'stop it,' " and she also heard the voice scream " 'help' " twice. The woman's voice sounded "distressed," which concerned Zyna N. The sounds were coming from "higher up." She then saw a police officer and approached him.

Berkeley Police Officer Kenneth Tu testified that Zyna N., a police department employee, approached him on the morning of December 22, 2016, and "said she thought she heard a female yelling help or stop" from a nearby apartment complex. They walked toward the building, where he also heard a woman screaming for help from the second floor. He did not hear a male voice. Tu immediately broadcast over the radio what he had heard, and he saw officers responding within minutes.

That same morning, at 7:33 a.m., the Berkeley Police Department received a 911 call that the dispatcher put into an incident report. A recording of the 911 call was played

[2] A fire extinguisher weighing 4.9 pounds was subsequently found on the second floor landing of the apartment building.

[3] Ada acknowledged that she had charges pending for five crimes, including petty theft, theft of mail, receiving stolen property in possession of United States mail, possession of methamphetamine, and possession of a pipe used to smoke methamphetamine.

for the jury at trial. In the recording, a woman from apartment 4 in the building where the incident took place stated that police needed to come because "there's a guy, a big guy that just came downstairs that beat the shit out of this girl."

Berkeley Police Officer Samantha Martinez testified that she responded to a dispatch regarding someone calling for help at the apartment complex. When she arrived at the scene, Martinez heard the sound of a woman screaming from the second floor. As she knocked on the locked front door of the building, another officer arrived. Appellant then opened the door. He was "aggressive and sweating profusely," and was yelling. He was also very large, approximately six feet six inches and 320 pounds. He was wearing pants, but no shirt, and she did not see any injuries anywhere on his body. Martinez told appellant to come outside, where other officers were now waiting. She then ran inside the apartment building to look for the victim.

Martinez saw blood droplets on the ground and on the stairs leading up to the second floor. When she arrived at apartment 5 on the second floor, Martinez saw Ada L. with a large laceration on the left side of her face and bruising and swelling to her left eye, as well as bleeding from other locations. Martinez also saw a large bruise on her forearm, but saw no injuries on her hands. Ada "was crying, fearful, very upset." Martinez was afraid she would lose consciousness because the bleeding from her head did not stop after Martinez administered first aid. Ada was taken by ambulance to a hospital, where Martinez later took a recorded statement from her, which was played for the jury at trial. Ada was still upset and crying, and fearful that she would be retaliated against for speaking with the police.

When Martinez came out of the building after assisting Ada, she saw that appellant had been detained. Although Martinez saw no injuries to his face, torso, arms, or palms of his hands, she saw cuts on his knuckles. Martinez subsequently tried to contact L.L., who had given Martinez her phone number on the day of the incident, but Martinez was never able to reach her.

Dr. Robert Golomb, who testified as an expert in emergency room medicine, treated Ada L. in a hospital emergency room at 8:17 a.m. on December 22, 2016. When

Dr. Golomb asked why she was there, Ada said that she had been assaulted by her sister's boyfriend and had been hit with a fire extinguisher. She said this had happened after he complained that she was talking on the phone too loudly. Dr. Golomb observed a "curved" laceration on Ada's left temple; it was shaped like "a segment of a circle." The wound required 11 and a half stitches. Ada was " 'alert and tearful' " during the examination and said she had not lost consciousness.

***Defense Case***

L.L. testified that Ada L. is her older sister and appellant is her boyfriend. On the morning of December 22, 2016, she and appellant were sleeping on a mattress in the living room of her apartment when appellant woke her up and said her sister was there. L.L. saw Ada in the hallway on her phone; she was engaged in a loud, angry conversation and was using "a lot of aggressive words." L.L. could tell Ada was in a bad mood. She kept staring coldly at L.L., who asked her to leave. Appellant, who was still lying on the mattress, said to Ada, " 'It is too early for all that negativity. The kids are sleeping.' " Ada started yelling, calling appellant a bitch and using other curse words as she walked a bit closer to the mattress. L.L. knew that Ada was using "fighting words and she was getting ready to attack."

Appellant got up and got dressed and tried to leave the apartment. Ada blocked his way and started threatening him. L.L. had gotten in between them when Ada spit in appellant's face. L.L. started to push Ada out of the apartment. Ada tried to punch her, but the punch landed in appellant's eye. Appellant got angry and he and Ada started "tussling" in the kitchen as L.L. tried to pull them apart. Ada, however, continued "kicking, punching, pulling hair, [and] scratching" appellant. Ada grabbed a knife or "other pokey object" off of the kitchen counter and went toward appellant "[l]ike she wanted to cut him." L.L. then saw the knife on the floor and saw Ada pulling appellant's hair. She also saw Ada grab a fire extinguisher that was on the wall in the kitchen and try to swing it. A male neighbor then came into the apartment and pulled on Ada's arm to get her to leave, but Ada elbowed him and he left. The fight was over at that point and Ada walked out the front door; appellant did not follow her.

About a minute later, Ada came back to the apartment, "[s]till trying to run up and attack" appellant. There was "just a little tussle" in the hallway outside the apartment, during which Ada yanked appellant's shirt over his head, and that was the end of it. Two female neighbors were now out in the hallway too. L.L. never saw Ada bleeding and did not hear any female screaming for help.

The police came and L.L. saw appellant in handcuffs when she went downstairs. She talked to a female police officer and tried to tell her what had happened, but the officer, who had a smirk on her face, was not really listening. L.L. saw the police taking statements from everyone but her.

On cross-examination, L.L. denied that she refused to give a statement that day. She called the police department and went to the station in person to make sure her statement was taken, but no one would take her statement. L.L. also acknowledged that she did not actually see Ada make contact with appellant's body when she was swinging at him. She did see appellant grab Ada by the throat at one point and slam her to the ground. When the prosecutor asked L.L. on cross-examination,"[t]he reality was, that [appellant] didn't like the way that Ada was speaking to him, so he beat her up; isn't that right?" L.L. responded, "I don't remember. I don't know."

Appellant, who was 34 years old at the time of trial, testified about a number of prior convictions he had suffered.[4] He then testified that he met Ada the day before the incident when he and L.L. came back to L.L.'s Berkeley apartment and Ada was there. They had a friendly exchange, but when he heard L.L. and Ada's little brother cussing while talking to their mother, he asked Ada, " 'Y'all let him talk like that to your mom?' " She responded, " 'Why do you care?' " Neither was speaking aggressively during the exchange.

Appellant and L.L. spent the night in the apartment, on a mattress on the floor in the living room. The next morning around 7:00 a.m., while appellant was in the

[4] This prior conviction testimony will be discussed in depth in part II.A. of the Discussion, *post*.

bathroom, he heard someone knocking and banging on the front door. After he finished using the bathroom, he opened the front door and let Ada in. He lay back down on the mattress with L.L. while Ada went to the hall closet. He heard Ada talking on the phone to her father; she was yelling and swearing. Appellant said, " 'It's a little early in the morning for all that cussing.' "

Ada started yelling and swearing at appellant. He said he would leave and started getting dressed. L.L. got up and grabbed Ada while screaming, " 'No, stop.' " Appellant tried to walk around Ada and L.L. to get to the front door, but Ada cut him off in the kitchen and grabbed him by the hair. L.L. tried to hold her back, but Ada punched appellant several times in the face while still holding onto his hair. She then grabbed a knife off of the counter and came toward him with the knife in her hand. Appellant tried to grab the knife in a way that caused the blade to scratch the outside of his fingers several times. He grabbed her wrist with his left hand and punched her in the face with his right hand to get her to let go of the knife. He then said, " 'Let go,' " and punched her a second time in the face, at which point she let go of the knife. These were the only times he hit her during the entire incident, and he did so with two to three percent of his strength because he did not want to hurt her. Appellant bent over and picked up the knife while Ada hit him on the back of his head. He threw the knife on top of the refrigerator.

Appellant then grabbed Ada by the shoulders and spun her around so that he could go around her and leave. She grabbed a fire extinguisher that was on the kitchen wall and attempted to hit him with it, but he was able to pull it out of her hands. A male neighbor who heard L.L. screaming came into the apartment and appellant asked if he could get Ada out of the apartment. The neighbor grabbed Ada and pulled her out of the apartment and down the stairs.

Appellant and L.L. then comforted each other. Appellant then walked to the front door with the fire extinguisher still in his hands and saw Ada running at him. Appellant threw the fire extinguisher over the side of the balcony and braced himself. Ada grabbed him by the shirt, which was around his neck, and pulled it off. She was holding onto his hair, which he yanked out of her hand. He then heard the police knock on the downstairs

door, so he rushed downstairs, with blood dripping from the cuts on his hand, and opened the door for the officers. He was not aggressive with the female officer; he does not get aggressive. He simply said, " 'She attacked me and she is upstairs.' " The officer said to step outside and he did so. He tried to explain what had happened, but the officers were not listening. He was unable to make a statement or get medical attention.

Appellant did not see Ada bleeding during their interactions and he never hit her with the fire extinguisher.

***Stipulations***

The parties stipulated that if called as a witness, Berkeley Police Officer Jackson would testify that he transported and booked appellant into the Berkeley City Jail and read him his rights, at which time appellant invoked his rights and asked for an attorney.

The parties also stipulated that if called as a witness, Berkeley Police Officer Shira Warren would testify that on the date of the incident, she contacted L.L., who stated that her sister and boyfriend engaged "in a verbal altercation. Her sister hit [appellant] first, and [L.L.] did not see anything else. [L.L.] was uncooperative in providing any further information."

## DISCUSSION

### I. *Admission of the 911 Call*

Appellant contends the court abused its discretion when it admitted hearsay declarations from a 911 call.

#### A. *Trial Court Background*

Before trial, the prosecutor moved to admit the recording of a 911 call made by a neighbor in the apartment building where the incident between appellant and Ada took place, arguing that it was admissible as a spontaneous statement. (Evid. Code, § 1240.)

In the call, the neighbor first stated, "Yes, he's leaving, he's leaving, ya'll need to come here[.]" She then said, "There's a guy, there's a big guy that just came downstairs that beat the shit out of this girl. He don't even stay over here. . . . [¶] . . . [¶] He's black and he has dreads, he's really, really big." The neighbor said the man was coming from

apartment 5, but she did not know his name. She also said she was calling from apartment 4; "[t]hey're my neighbors[.]" She then said there were already officers there.

At a hearing on the prosecutor's motion, following arguments of counsel, the court tentatively found that the 911 call qualified as a spontaneous declaration, based on reading the transcript. It indicated that it would listen to the caller's voice on the recording to be sure that she was in fact making an excited utterance. The 911 call was ultimately played for the jury during the trial.

**B. *Legal Analysis***

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

"(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

"(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 65.)

Here, according to appellant, the trial court abused its discretion and "engaged in speculation and conjecture when it ruled the recording was admissible without evidence in the record that the caller was a percipient witness to the reported events."

In *People v. Phillips* (2000) 22 Cal.4th 226, 236 (*Phillips*), our Supreme Court stated that, although the requirement that a declarant be a witness to the event he or she described " 'does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a

percipient witness should not be purely a matter of speculation or conjecture. [Citation.]' [Citation.]"

We do not agree with appellant that in this case, the court's determination that the requirements of Evidence Code section 1240 were satisfied was based on speculation. The neighbor said she was a tenant of apartment 4, and was describing what had just happened involving someone who had come out of apartment 5, a neighboring apartment. L.L. testified at trial that two female neighbors had come out to the hallway when appellant and Ada were involved in a "tussle" in the hallway during the tail end of the incident. In addition, the neighbor provided a description of appellant and of what had just happened: a big guy who came out of apartment 5 and "just came downstairs" had "beat the shit out of this girl." She also described what was happening during the 911 call, stating, "he's leaving, he's leaving, ya'll need to come here[.]" She also said there were "a lot of police outside" and later noted that the police had entered the building. Her words demonstrate that the call was made just as the incident was ending, that she was describing what was occurring as it happened, and that she was concerned that appellant was getting away.

The neighbor's description of what had just taken place and what was currently taking place, together with other evidence admitted at trial, thus provided substantial evidence from which the court reasonably found a "persuasive inference" that during the call, the neighbor purported "to narrate, describe, or explain an act, condition, or event perceived by [her]" and did so "spontaneously while [she] was under the stress of excitement caused by such perception." (Evid. Code, § 1240, subds. (a), (b); see *Phillips*, *supra*, 22 Cal.4th at p. 236.) The court did not abuse its discretion when it admitted a recording of the 911 call into evidence. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 65.)

**II.** ***Admission of Evidence of Appellant's Prior Misdemeanor Convictions***

Appellant contends the trial court abused its discretion and violated his right to a fair trial when it changed its pretrial ruling during his direct testimony to admit evidence of two prior misdemeanor convictions to impeach his testimony.

### A. *Trial Court Background*

Before trial, the prosecutor moved to admit evidence of appellant's four prior felony convictions as impeachment if he testified, stating that he had "engaged in a pattern of criminal activity before and since," including convictions of two misdemeanor convictions in October 2016, for violations of sections 422 (making criminal threats) and 417, subdivision (a)(1) (brandishing a weapon other than a firearm). Appellant moved to exclude evidence of his prior felony convictions, as well as any mention of his current probationary status and prior misdemeanor convictions or the underlying conduct on the grounds of hearsay, lack of relevance, and undue prejudice under Evidence Code section 352.

At a hearing on the motions, the court ruled that appellant's four prior felony convictions could be used for impeachment if appellant testified. With respect to the recent misdemeanor convictions and appellant's probationary status, the prosecutor stated, "I don't intend to introduce that information affirmatively in my case-in-chief. However, should, through the course of the defense potentially putting on their case, some kind of a door be opened to this, such as, for example, the defendant saying, 'I haven't been in trouble for a while,' or something to that effect, then I would want to readdress this at a later point. But that's the only—that's the only time that I can see this becoming an issue."[5]

The court then stated, " I tend to agree with [defense counsel]. I think my inclination is to grant this motion, not allow the district attorney to independently, as far as his case-in-chief, bring out this fact or information. However, the door could be opened if the defendant testifies as a witness on his own behalf. And should the door be opened, we go and litigate outside the presence of the jury. However, the door is opened and, if so, how wide and what can go through it. [¶] . . . [¶] So I will grant that motion with the caveat that I just made." The court then stated that should the prosecutor "offer,

[5] The prosecutor observed that only the underlying conduct, not the fact of the misdemeanor convictions, was admissible.

not the fact of the conviction, but the underlying conduct which underlies a misdemeanor conviction, for example, or even that there is no conviction, I will consider with particular care whether or not this involves undue time, confusion, or prejudice."

During trial, appellant testified at the start of his direct examination that 15 or 16 years earlier in 2002, when he was 18, he had pleaded guilty to two felonies, robbery and assault with intent to cause great bodily injury, after he and his brother beat up a bus driver who had assaulted his little sister. The following exchange then took place between defense counsel and appellant.

"Q. . . . [A]re you the same person you are now as you were when you were of that age?

"A. No, not at all.

"Q. Okay. [¶] Would you consider that a mistake?

"A. Yeah, it was. It was a mistake. I mean, I know a lot better now. I wasn't grown at 18 just because I am legally grown. I didn't have the knowledge I have now when I was 18.

"Q. . . . [S]o after that, is it safe to say you haven't been in any trouble; is that right?

"A. No, I got into more trouble. About seven years ago, I had a felony for ex-felon with a firearm.

"Q. Let's talk about that. How long ago did that happen?

"A. Seven years ago.

"Q. And did you have to do some time for that?

"A. I did. I was sentenced to—I took a plea deal again and I was sentenced to 16 months in State Prison, and I served 4 months in State Prison.

"Q. Okay. [¶] After that, did you stay out of trouble?

"A. I caught one more felony and it was for a drug charge, and that was about five years ago. [¶] . . . [¶]

"Q. . . . Was it just [for] possession?

"A. No, it was a sales charge. Sales of cocaine.

"Q. And how long ago was that?

"A. I believe five years ago.

"Q. How old were you then?

"A. 29.

"Q. Did you have to go to prison that time?

"A. No. I only went to prison once for the four months. . . .

"Q. Okay. [¶] Any other felony convictions that we haven't talked about?

"A. No, yes. That's it.

"Q. Okay.

"A. Four felonies."

After the jury was excused for the day, the court granted the prosecutor's request, over defense counsel's objection, to cross-examine appellant about the facts underlying his convictions for robbery and assault, based on evidence from the preliminary hearing transcript in that case, which contradicted appellant's testimony. The following morning, the prosecutor further stated that he believed appellant's testimony that he was " 'a completely different person now,' " " 'a changed man,' " " 'an adult now,' " and "a very different person now than I was when I did things' " was "misleading" and "opened the door" to not only cross-examination regarding the underlying facts of his 2002 felony convictions, but also to "the fact that in October of this previous year, 2016, October 7, 2016, two months before the assault that led him to this courtroom, the defendant was convicted of a misdemeanor and [*sic*] criminal threats . . . , as well as a misdemeanor brandishing charge . . . , and the defendant had just been placed on probation about two months before he assaulted Ada L. [¶] So to say that he is a changed man, I think is incredibly misleading, and to leave the jury with that impression, I think would be unfair."

Defense counsel objected to admission of the misdemeanor convictions and also stated that the prosecutor's representation of appellant's testimony was inaccurate and that the testimony that he was a different person, knew a lot better now, had grown, and had more knowledge than when he was 18 was "just a statement of reality. He is—from

18 to 34, you grow." The prosecutor responded that appellant's testimony that he was not the same person now was intended to convey to the jury that it was a mistake he made when he was young, and to imply that "I am a grown man now, I wouldn't do something like that now. That's the clear impression that the jury would be left with . . . ."

The court overruled defense counsel's objections, finding that the questions and answers on direct examination that had been under discussion "open[ed] the door even wider than it was by the previous statements [about the 2002 felonies]. This time [defense counsel] asked him the questions, and [appellant] responded in a way that would indicate that the misdemeanor conviction[s]" are now relevant facts. "And [appellant] and [defense counsel] have made them so by their questions. This goes beyond the scope and ruling I made earlier and in limiting the impeachment for these prior acts; it is because of [appellant's] gratuitous statements and, further on, [defense counsel's] further questions, which [were] elicited, that would make the conduct in October 2016, two misdemeanor convictions, criminal threats and brandishing a deadly weapon and being placed on probation, makes that relevant." The court stated that it would, therefore, allow the prosecutor to cross-examine on all of these points.

Subsequently, during continued direct examination, appellant acknowledged that he was on misdemeanor probation after pleading guilty to making criminal threats and brandishing a deadly weapon other than a firearm.

On cross-examination, the prosecutor and appellant engaged in several exchanges on this issue, including the following.

"Q. You say you are a different man today than you were when you were 18 years old; isn't that what you said to [defense counsel]?

"A. Of course. Oh, that was 16 years ago. I was still a teenager at 18.

"Q. You don't want to hurt people; you don't yell, you don't get aggressive, right? That's the portrayal of yourself that you're telling to this jury?[6]

[6] Appellant had testified on direct examination that he does not "talk aggressive at all" and "don't be [*sic*] around . . . negative stuff and all that. I will leave. . . . I don't want it in my life."

"A. That's the truth.

"Q. But the fact of the matter is, you didn't change after; you didn't learn after you were convicted of robbery and assault when you were 18, right? You didn't learn.

"A. No, that's wrong. . . . I learn constantly. I constantly work on self-improvement."

After appellant denied that he had not learned after he was convicted of being a felon in possession of a firearm and possessing cocaine with the intent to sell it in 2011, the prosecutor continued:

"Q. You didn't learn after you were convicted of misdemeanor criminal threats and brandishing a deadly weapon in October of 2016 and placed on probation. You didn't learn; did you?

"A. Actually that's when I learned to not be around negative people at all whatsoever. . . .

"Q. "Was it on December 22nd of 2016 at about 7:30 in the morning? Was that when you finally learned what you were talking about, how you became a changed man and a new person? Was that the day it happened?

"A. I have been the way I am for a little while. . . ."

Then, after going into the facts underlying the 2002 convictions and the existence of the subsequent felony convictions, the prosecutor again raised the two misdemeanor convictions.

"Q. And in October of 2016, two months before this incident that we are here talking about today, you also plead guilty to criminal threats [and] brandishing a deadly weapon . . . ; isn't that correct?

"A. That's correct, sir.

"Q. And at the time that you were sleeping at [L.L.'s] house before Ada came over, you had just been placed on probation for that misdemeanor case two months before; isn't that right?

"A. That's correct, yes, sir.

"Q. But here today, you are telling this jury that on December 22nd you were a peacemaker?

"A. That's correct. . . . [¶] . . . [¶]

"Q. You are telling this jury that all you wanted to do was be a peacemaker and make sure that there was no cussing going on in front of these little kids, right?

"A. No, I didn't say that at all. I never said I wanted to be a peacemaker. I don't try to control other people. . . .

During closing argument, the prosecutor referred to appellant's testimony that he had learned a lot, first mentioning appellant's 2010 and 2011 felony convictions, and continuing, "What has he learned? Because just two months before this incident happened, he was convicted of misdemeanor criminal threats and brandishing a deadly weapon other than a firearm and he was placed on probation. And then this happens. Two months later. He wants to say those are just mistakes. I have learned. I am a different person. What has he learned? How is he different? Those convictions are relevant to his credibility as a witness and he tried to minimize them, but they are not minimal at all. . . . He clearly . . . tried to present himself to you as a man of peace, an educated man, a man that pursues knowledge, a person who is trying to help this family to have their kids treat their elders with respect, but he also told you that he has been fighting his whole life. And his criminal history is relevant to his credibility as a witness when he tells you um, he is a non-violent person and that he doesn't like conflict. He doesn't like yelling. [¶] . . . [¶]

"So in the scheme of things, you shouldn't believe anything [appellant] said because he lied to you, because he has got this criminal history that shows that he is clearly not a person worthy of trust . . . ."

The court instructed the jury, pursuant to CALJIC No. 2.23.1, that "[e]vidence showing that a witness, engaged in past criminal conduct amounting to a misdemeanor may be considered by you only for the purposes of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness'

believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

The jury ultimately found appellant guilty of assault with a deadly weapon, but found not true the great bodily injury allegation.

**B. *Legal Analysis***

" '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.] When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931–932 (*Clark*).)

"[A]dditional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296–297.)

In addition, while the trial court has "broad discretion to admit or exclude acts of dishonesty or moral turpitude 'relevant' to impeachment, *the fact of conviction of a misdemeanor* remains inadmissible under traditional *hearsay* rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness." (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 288; accord, *People v. Chatman* (2006) 38 Cal.4th 344, 373.)

Here, appellant argues that the court abused its discretion when it admitted the prior misdemeanor conviction evidence for impeachment because the evidence was more prejudicial than probative. (See Evid. Code, § 352.) Specifically, he claims that, even assuming his testimony on direct examination implied that he was no longer a violent person, the evidence of the two misdemeanor convictions and his probationary status was unduly prejudicial under Evidence Code section 352, and that the court erred in failing to analyze the admissibility of the evidence pursuant to that section. Appellant also argues that the prosecutor engaged in excessive and abusive cross-examination and closing argument in which he repeatedly called attention to the misdemeanor convictions. Finally, appellant argues that regardless of these other issues, the court plainly abused its discretion when it admitted the *fact* of appellant's misdemeanor convictions, rather than solely the conduct underlying them.

Appellant is correct that the court abused its discretion when it permitted the prosecution to impeach appellant with *the fact of* the two misdemeanor convictions themselves, rather than solely the conduct underlying the convictions. (See *People v. Wheeler*, *supra*, 4 Cal.4th at p. 288.)[7] However, we need not definitively decide the additional questions raised by appellant: whether admission of the misdemeanor conviction evidence was more prejudicial than probative and/or whether the prosecutor's cross-examination and closing argument on this topic was excessive, because, considering the strength of the evidence against appellant presented at trial, any such error was necessarily harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Appellant asserts that analyzing the error under the *Watson* standard of error is not appropriate in the circumstances of this case, and that it should be reviewed under the federal constitutional standard because the court violated his due process right to a fair trial when it contradicted its pretrial ruling in the middle of his direct examination and

[7] During appellant's testimony and closing argument, neither the prosecutor nor defense counsel raised the specific conduct underlying the two misdemeanor convictions, but only the fact that appellant was convicted of the two offenses.

permitted the prosecutor to question him about the misdemeanor convictions and use them in closing argument. In support of this claim, appellant relies on *People v. Hall* (2018) 23 Cal.App.5th 576, 582, 587 (*Hall*),[8] in which the trial court initially ruled that evidence of the conduct underlying the defendant's prior misdemeanor conviction for carrying a concealed knife was inadmissible in the prosecutor's case in chief to impeach a statement the defendant made to police after his arrest that he was "not into violence" and had "no violent record at all." The court stated, however, that if the defendant—who was charged with first degree murder with use of a knife—testified, " 'he better be careful about how he testifies with regard to his statement to the police that he's a peaceful person.' " (*Id.* at p. 587, italics omitted.) After the defendant took the witness stand, the court reversed its prior ruling, incorrectly stating that it had not made a final decision on the issue of the use of the prior misdemeanor conviction for purposes of impeachment, and that because, in his testimony, the defendant had not " 'disavowed his statement to the police in its entirety,' " " 'he would be getting a windfall were he allowed to prevent that testimony from coming about, limited only on the issue of his credibility.' " (*Hall*, at p. 588.)

On appeal, Division One of this District reversed the judgment of conviction, first finding that the trial court's initial ruling excluding the misdemeanor conviction evidence was *not* tentative and that because the defendant had not stated or implied in his direct testimony that he was a peaceful person, the prior knife incident was not admissible to rebut that specific claim. (*Hall*, *supra*, 23 Cal.App.5th at p. 591.) The prosecutor should not have been permitted to rebut appellant's implied assertion of a character for peacefulness *in his pretrial statement* with evidence of a character for violence, given that appellant had not placed his character at issue *during trial*. (*Ibid*.) The *Hall* court therefore found that the trial court had abused its discretion under Evidence Code sections 1101, 1102, and 352 when it "reversed itself and admitted evidence of the [knife

[8] We permitted appellant to file a supplemental opening brief to address *Hall's* relevance to the present case.

wielding] incident, despite repeatedly finding the evidence was likely to prove prejudicial and misleading." (*Hall*, at p. 594.)

The court then addressed whether the trial court's about-face on the admissibility of the conduct underlying the misdemeanor conviction required that the error be judged under the federal constitutional standard of error. (*Hall*, *supra*, 23 Cal.App.5th at p. 594, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) The court ultimately found that the *Chapman* test was required, explaining: "It is one thing to postpone a ruling on the admissibility of prior conviction evidence until after the defendant testifies; it is another thing altogether to definitively rule prior conviction evidence *inadmissible*—inevitably influencing how defense counsel advises his client about the choice whether to testify or remain silent—only to completely reverse the ruling after the defendant has made the irrevocable choice to testify. And the record reflects no basis for the trial court's ruling change. In our view, the distinction is a critical one that implicates the defendant's right to the effective assistance of counsel, to testify, not to testify, and the overall fairness of the trial." (*Hall*, at p. 599.) Applying the *Chapman* standard of error, the court held that admission of evidence of the prior knife-wielding incident that resulted in a misdemeanor conviction was not harmless beyond a reasonable doubt. (*Hall*, at p. 601.)

We do not agree with appellant that the facts of *Hall* and the appellate court's reasoning are applicable here, where, from the outset, the trial court stated that although it would "not allow the district attorney to independently, as far as his case-in-chief, bring out this fact or information," i.e., the appellant's prior misdemeanor convictions and probationary status, "the door could be opened if the defendant testifies as a witness on his own behalf. And should the door be opened, we go and litigate outside the presence of the jury. . . ." Because the court made clear that it would revisit its pretrial ruling if appellant testified in a way that opened the door to impeachment with the prior conviction and probation evidence, the court's subsequent ruling was *not* a "complete reversal" of a pretrial ruling, which is what resulted in the constitutional violation in *Hall*. Accordingly, we will analyze the question of prejudice under the state standard of error. (See, e.g., *People v. Partida* (2005) 37 Cal.4th 428, 439 ["Absent fundamental

unfairness, state law error in admitting evidence is subject to the traditional *Watson* test"].)

First, and most importantly, while appellant is correct that the trial was in part a credibility contest between him and Ada, particularly as to who was the primary aggressor, the evidence overwhelmingly supports the jury's finding that appellant committed an assault with a deadly weapon, regardless of whether it took place in the context of a one-sided beating by appellant or with Ada taking a more active role in the altercation. Dr. Golomb, who treated Ada at the hospital emergency room, testified that she had a curved laceration, shaped like a segment of a circle, on the left side of her head, which matched Ada's testimony that appellant hit her in the left temple area with the bottom circular part of the fire extinguisher. Also, Officer Martinez testified that Ada had a laceration on the left side of her face that did not stop bleeding when Martinez administered first aid. In light of this strong evidence that appellant did hit Ada with the fire extinguisher, and the general intent required for assault with a deadly weapon, it is highly unlikely the jury would have found appellant not guilty had the prior misdemeanor conviction evidence and the prosecutor's questions and closing argument been excluded. (See *People v. Perez* (2018) 4 Cal.5th 1055, 1066 [required mens rea for assault with a deadly weapon is " 'an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another' "]; see also *In re D.T.* (2015) 237 Cal.App.4th 693, 698–699 [objects not designed for use as weapons, "[f]or example, a bottle or a pencil, while not deadly per se, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), when used in a manner capable of producing and likely to produce great bodily injury"].)

In addition, evidence admitted at trial about the nature of the incident contradicted appellant's and L.L's testimony in significant ways and strongly suggested that they were lying about Ada being the primary aggressor in the incident, with appellant merely trying to defend himself. For example, a police department employee heard a distressed female voice screaming "help" and "stop" several times from an upper floor of the building.

Officers Tu and Martinez each testified that they heard a woman screaming from the second floor of the building. Martinez also saw no injuries on appellant's torso, arms, face, or hands other than cuts on his knuckles, but saw multiple injuries on Ada, including the large laceration on the left side of her face, other bleeding injuries, and bruising and swelling to her left eye. This testimony contradicted both appellant's and L.L.'s testimony that they heard no female screaming for help and did not see Ada bleeding. According to appellant, all of the blood drops on the stairwell came from him.

Moreover, on cross-examination, L.L. testified that at one point, she saw appellant grab Ada by the throat and slam her on the ground and, in response to a question regarding whether appellant had in fact "beat [Ada] up" because he did not like the way she was speaking to him, L.L. responded, "I don't remember. I don't know." Appellant himself acknowledged he had punched Ada twice in the face, although he said he used only a fraction of his strength and did so to get her to let go of a knife.

Other contradictory evidence included the 911 call by a neighbor who stated that a woman had been beaten up by a man matching appellant's description**.** In addition, although appellant testified that he was not yelling and did not get aggressive when he opened the door to Officer Martinez,[9] Martinez described him as aggressive and yelling when he opened the door. Moreover, while both appellant and L.L. testified that they tried to give statements to police about what had happened but no one would listen to them, Officer Martinez testified that she tried to contact L.L., but was never able to reach her. The parties also stipulated that the officer who transported appellant, booked him into jail, and read him his rights would testify that appellant invoked his right to remain silent and asked for an attorney. The parties further stipulated that another officer, if called as a witness, would testify that on the day of the incident, L.L. stated that her sister and her boyfriend had a verbal altercation, her sister hit her boyfriend first, and she did not see anything else, and that L.L. was uncooperative in providing any further

[9] Appellant testified on direct examination, "I stepped outside. I wasn't yelling. I wasn't aggressive. I don't get aggressive." Appellant also described himself as "in control of myself" and "100 percent calm and collected" during the incident with Ada.

information. Finally, the evidence showed that appellant was a foot taller than Ada and twice her weight, which cast doubt on his testimony that he could not get away from Ada as she attacked and beat him repeatedly.

In light of this varied and vast amount of evidence demonstrating that appellant was lying about what had transpired between him and Ada and casting doubt on his testimony that Ada was the attacker and he was the victim, together with the medical testimony that Ada had been hit on her left temple with a circular object consistent with the shape of the bottom of the fire extinguisher found at the scene, it is not reasonably probable that the result would have been different had the challenged evidence been excluded.[10] (See *Watson, supra*, 46 Cal.2d at p. 836; cf. *People v. Marks* (2003) 31 Cal.4th 197, 229 ["in light of the overwhelming strength of the People's case, any possible error regarding the admission of either the prior convictions or defendant's parole status was surely harmless"].)[11]

### III. *Prior Prison Term Enhancement*

Appellant contends the court improperly imposed a one-year consecutive sentence for a prior prison term because the prosecutor failed to prove that he did not remain prison-free and felony-free for a continuous five-year period.

"Section 667.5 provides in relevant part: 'Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: . . . [¶] (b) Except where subdivision (a) [concerning certain violent felonies] applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior

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[10] That the jury did not find true the allegation that appellant had personally inflicted great bodily injury on Ada and that it could have believed she had been more aggressive than she claimed in her testimony does not change the fact that the evidence supporting appellant's conviction of assault with a deadly weapon was overwhelming.

[11] Appellant argues that even if any one of the two alleged trial court errors (see pts. I. & II., *ante*) did not prejudice him, the judgment should nonetheless be reversed based on the cumulative prejudice of the errors. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) In light of our resolution of the issues, there is no ground for reversal based on cumulative error.

separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of *both* prison custody *and* the *commission of an offense* which results in a felony conviction. . . .' (Italics added.) The last phrase is commonly referred to as the 'washout rule' where a prior felony conviction and prison term can be 'washed out' or nullified for the purposes of section 667.5.

"According to the 'washout' rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply. [Citations.] Both prongs of the rule, lack of prison time *and* no commission of a crime leading to a felony conviction for a five-year period, are needed for the "washout" rule to apply. This means that for the prosecution to prevent application of the 'washout' rule, it must show a defendant *either* served time in prison *or* committed a crime leading to a felony conviction within the pertinent five-year period. [Citations.]" (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229 (*Fielder*).)

"[W]hether a parolee has remained free of prison custody depends on whether he has either remained on parole *without revocation* during, or been discharged from custody preceding, the required continuous five-year period. [Citation.] The reasons for parole revocation and the place of a parolee's confinement after parole revocation are not pertinent to this determination. [Citation.]" (*In re Preston* (2009) 176 Cal.App.4th 1109, 1117. A parolee "who reoffends and is confined in a local jail after a parole revocation may [not] avoid the enhanced punishment of section 667.5[, subd.] (b)" (*Id*. at pp. 1116–1117; see also, *People v. Whigam* (1984) 158 Cal.App.3d 1161, 1167 ["the purpose of section 667.5 to deter recidivism is implemented by enhancing the sentences of felons who fail to perform on parole, *here probation*, by committing additional felonies"], citing *In re Kelly* (1983) 33 Cal.3d 267, 273, italics added.)

"The prosecution has the burden of proving beyond a reasonable doubt each element of the section 667.5, subdivision (b) sentence enhancement, including the fact of no five-year 'washout' period. [Citation.] When, as here, a defendant challenges on

appeal the sufficiency of the evidence to sustain the trial court's finding that the prosecution has proven all elements of the enhancement, we must determine whether substantial evidence supports that finding. The test on appeal is simply whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt. In that regard, in conformity with the traditional rule governing appellate review, we must review the record in the light most favorable to the trial court's finding(s). [Citation.]" (*Fielder*, *supra*, 114 Cal.App.4th at p. 1232.)

In the present case, the evidence considered by the trial court included an abstract of judgment stating that appellant was sentenced on November 14, 2016 to a "Paper Commitment" of three years in prison for his October 4, 2011 conviction for sales of a controlled substance, following the revocation of his probation in that case due to his violation of section 166, subdivision (a)(4) (contempt of court for disobeying a court order). The paper commitment was based on his having already served 548 actual days in local custody for the 2011 drug offense, with an additional 548 days of conduct credits added, thus more than fulfilling the three-year prison term for the October 2011 conviction.

This evidence demonstrates that after his October 4, 2011 felony conviction, appellant subsequently served a total of 584 days—more than 18 months—in jail before committing the current offense on December 22, 2016. (*In re Preston, supra,* 176 Cal.App.4th at pp. 1116–1117.) Accordingly, at the time he committed his current felony offense, he could not have been free of custody for five years. That the exact dates when appellant was in jail for the 2011 drug conviction are not necessarily apparent from the record[12] does not negate the evidence that appellant had not been custody free for five

[12] We do note that People's exhibit 10 contains numerous "Certified California Law Enforcement Communications System" printouts of appellant's criminal history, including a document showing that, in addition to five years of probation, he was sentenced to 270 days in jail in the October 2011 drug sales case, and that he thereafter repeatedly violated his probation, which was modified several times, with additional jail time added.

years when he committed the current offense. Having spent 584 actual days in custody between his October 2011 conviction and December 2016, when he committed the current offense, it would not be possible for the washout period to apply. (See *ibid.*; § 667.5, subd. (b).)

Therefore, reviewing the record in the light most favorable to the court's finding, as we must, we conclude substantial evidence supports the court's determination that appellant did not remain custody free for five years, and therefore properly found true the prior prison term allegation. (See § 667.5, subd. (b); *Fielder*, *supra*, 114 Cal.App.4th at p. 1232.)

**DISPOSITION**

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Miller, J.

*People v. Tingle* (A153461)